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Nos. 88-1249 and 88-1250

In the Supreme Court of the United States

OCTOBER TERM, 1988

SOUTHERN BELL TELEPHONE & TELEGRAPH CO., ET AL.,
PETITIONERS

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL.

NEW ENGLAND TELEPHONE AND
TELEGRAPH COMPANY, ET AL., PETITIONERS

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL.

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*ON PETITIONS FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT*

SUPPLEMENTAL MEMORANDUM FOR THE FEDERAL RESPONDENTS

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In its amicus brief in support of petitioners, the Communications Satellite Corp. (COMSAT) correctly observes (at 4) that in 1988 the Federal Communications Commis-

sion ordered COMSAT to refund amounts collected in excess of a previously prescribed rate of return (*COMSAT*, 3 F.C.C. Rcd 2643 (1988)) and that the Commission there relied on the court of appeals' ruling in the present case to reject the claim that the refund order was beyond the Commission's statutory authority (*id.* at 2645). That Commission decision is currently on review in the D.C. Circuit, which has deferred briefing pending the disposition of the petitions in these cases. We file this brief supplemental memorandum in response to COMSAT's amicus submission, since we had overlooked the *COMSAT* case in preparing our brief in opposition to the petitions for a writ of certiorari in these cases.

Notwithstanding the Commission's reliance in *COMSAT* on the ruling at issue here, the pendency of the *COMSAT* decision in the court of appeals does not undermine our submission that the continuing importance of the present ruling is insufficient to warrant review. First, besides *COMSAT*, there is no other outstanding decision raising the refund issue decided by the court of appeals here. Second, in *COMSAT* itself, as in the present cases, the Commission ordered refunds only with respect to rates that took effect subject to investigation and were made subject to an accounting order under Section 204.* See 3 F.C.C. Rcd at 2644, 2645-2647; *COMSAT*, 2 F.C.C. Rcd 3706, 3708 (1987) (proposing refund order). Third, COMSAT's appeal from the Commission's *COMSAT* decision may well raise other issues that might make it unnecessary for the court of appeals to consider the Commission's refund

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**COMSAT*, CC No. 80-634, Mem. Op. & Order (released Aug. 2, 1984) (allowing tariff changes to take effect subject to investigation with issues to be designated in subsequent order, citing Section 204); *COMSAT*, CC No. 86-634, Mem. Op. & Order (released Nov. 8, 1985) (designating issues and requiring accounting under Section 204(a)).

authority at all. Thus, the question presented by petitioners here—the Commission's refund authority outside the Section 204 context—might not be or have to be resolved by the court of appeals on review of the *COMSAT* decision, and there is no other pending case raising the issue.

Accordingly, for the reasons set forth in our brief in opposition, the present petitions should be denied.

Respectfully submitted.

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Acting Solicitor General

APRIL 1989

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